No. 01-619

IN THE

Supreme Court of the United States

PATRICIA BRAGG, *et al.*,

Petitioners,

v.

WEST VIRGINIA COAL ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR INDUSTRY-RESPONDENTS

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QUESTION PRESENTED

The question properly presented by the petition is the following: Did the Fourth Circuit correctly hold, in light of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that the Eleventh Amendment bars a lawsuit in federal court to enjoin a West Virginia state official to comply with a state law?

PARTIES TO THE PROCEEDING

The identification of the parties as stated in the petition requires one modification. Effective January 1, 2001, the West Virginia Mining and Reclamation Association merged into the West Virginia Coal Association.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Industry-Respondents state that:

Respondents, Hobet Mining, Inc., Catenary Coal Company and Mingo-Logan Coal Company, are wholly-owned subsidiaries of Arch Coal, Inc.

Respondent, National Council of Coal Lessors, Inc., a trade association, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INDUSTRY-RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Hobet Mining, Inc., Catenary Coal Company, Mingo-Logan Coal Company, West Virginia Coal Association, National Council of Coal Lessors, Inc., and Western Pocahontas Properties Limited Partnership (collectively, the Industry-Respondents) submit this brief in opposition to the petition for writ of certiorari pursuant to United States Supreme Court Rule 15.

STATEMENT OF THE CASE

1. West Virginia's Surface Mining Laws.

The state laws at issue in this petition are embodied in the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code §§ 22-3-1 to 22-3-32 (the West Virginia Mining Act), and the state regulations promulgated by the West Virginia Department of Environmental Protection (WVDEP) pursuant thereto, W.Va. Code St. R. (C.S.R.) Title 38. Those statutory provisions and regulations comprehensively regulate every facet of surface mining as well as surface effects of underground mining. These wide ranging laws include detailed provisions that address the restoration of mined areas, *see, e.g.*, W.Va. Code § 22-2-13(b)(3), (b)(19) & (c), and the safe and environmentally sound placement in permanently stable areas of excess soil and rock not used to restore mined areas. *See, e.g.*, W.Va. Code § 22-3-13(b)(22); W.Va. Reg. 38 C.S.R. § 2-14.14.

West Virginia's surface mining program is administered by the Secretary (formerly, Director) of WVDEP. W.Va. Code § 22-3-2(c). All mining operations in West Virginia—underground and surface alike—must obtain a surface mining permit from WVDEP after submitting a detailed application that establishes

the proposed operation's compliance with West Virginia's comprehensive laws. W.Va. Code §§ 22-3-8 & -9.

One of those laws is the so-called buffer zone rule set forth in W.Va. Reg. 38 C.S.R. § 2-5.2. At the time of the Fourth Circuit's decision below, that regulation provided in pertinent part:

> No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards.

W.Va. Reg. 38 C.S.R. § 2-5.2.

Most surface mine operations in West Virginia cannot be conducted without a variance from the buffer zone rule that enables the operator to construct a valley fill. This is because surface mining inevitably produces excess soil and stone, referred to as "excess overburden," that is not needed to restore the mined area. *Bragg v. West Virginia Coal Assoc.*, 248 F.3d 275, 286 (4th Cir. 2001) (App. 4a).

Ridgetops and hilltops in the rugged terrain of Appalachia are generally too steep to accommodate the permanent, stable placement of excess overburden as required by West Virginia law. The only feasible place to dispose of excess overburden,

therefore, is in the bottoms of valleys or hollows. *JA 621, 679-80* (Petitioners' expert), 1021, 1061-62, 1313.[1]

The bottom of a valley or hollow almost invariably satisfies the broad regulatory definition for at least an intermittent stream—which may be no wider than a pencil and have running water only during a rainy season. As a result, the regulatory requirement for the stable placement of excess overburden and the law of gravity mean that the coal industry simply could not exist in mountainous areas without valley fills. *See West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1293 (S.D.W.Va. 1989), *aff'd*, 932 F.2d 964, 1991 WL 75217 (4th Cir. 1991) (unpublished) (describing valley fills as "necessary to carry on mining operations").[2]

2. SMCRA And State Surface Mining Programs.

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C § 1251 *et seq.*, is the federal statute regarding surface mining. SMCRA is administered by the Office of Surface Mining (OSM) within the Department of Interior. 30 U.S.C. §§ 1265(a) & 1266(b). OSM's regulations promulgated pursuant to SMCRA are codified at 30 C.F.R. Parts 700-899.

Enacted in 1977, SMCRA adopts a unique approach toward the regulation of surface mining that is intended to ensure the continued viability of the surface mining industry and to promote federalism. *See Hodel v. Virginia Surface Coal Mining and*

1. References in the form "*JA* __" are to the joint appendix from the proceedings in the court below.

2. The same is true for underground mining, which produces excess rock and coal that is frequently disposed of in stream impoundments and that thus requires a variance from the buffer zone rule. *JA 2275-76.*

Reclamation Assoc., Inc., 452 U.S. 264, 289 (1981) (SMCRA establishes "a program of cooperative federalism" that allows states "to enact and administer their own regulatory programs, structured to meet their own particular needs").

These twin goals are reflected in the congressional findings that preface SMCRA, in which Congress affirmed the importance of surface mining to the "economic well-being, security, and general welfare of the Nation." 30 U.S.C. § 1201(j). These findings also endorse the importance of retaining state regulatory authority over surface mining due to the vast heterogeneity of mining conditions throughout the country:

> [B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States . . . .

30 U.S.C. § 1201(f). The "Statement of Purpose" in SMCRA is to the same effect. It states that the Act's purpose is to regulate surfacing mining, and not to abolish it. 30 U.S.C. § 1202(f). It also states that the Act's purpose is to "assist," not supplant, the States in that endeavor. 30 U.S.C. § 1202(g).

The structure SMCRA implemented to achieve those objectives is straightforward. Following an interim program of parallel state and federal regulation, SMCRA contemplated a regime "with enforcement responsibility lying with *either* the State *or* Federal Government." *Hodel*, 452 U.S. at 269 (emphasis added).

The allocation of that authority in a particular State depends upon that State's law. If the State enacts its own program for the regulation of surface mining and if OSM certifies that the program comports with the minimum federal standards set forth in both SMCRA and OSM's regulations, then, in SMCRA's words, the State obtains "exclusive jurisdiction" over the regulation of surface mining within its borders. 30 U.S.C. § 1253(a). Otherwise, federal law provides the pertinent rules for surface mine operations in the State.

When a State obtains exclusive jurisdiction over surface mining in its borders, OSM retains a general oversight function to ensure that the State adheres to its approved program. If the Secretary of Interior (or her delegate, OSM) determines that a State is failing to enforce its program, OSM can revoke its approval of the State's program. 30 U.S.C. §§ 1267, 1271. In that event, the "exclusive jurisdiction" over the regulation of surface mining reverts to the Secretary of the Interior. 30 U.S.C. § 1254(a). But unless such revocation occurs, the exclusive jurisdiction to regulate remains with the State.

3. Petitioners' Lawsuit.

OSM approved West Virginia's regulatory program in 1981. *See* 30 C.F.R. § 948.10. OSM has never revoked that approval. West Virginia, therefore, has had exclusive jurisdiction over the regulation of surface mining in the State since 1981.

Pursuant to that authority, the State Secretary has reviewed and, where appropriate, approved state permits for surface mines for the past 20 years. Also where appropriate, the State Secretary has approved variances from the West Virginia buffer zone rule to permit the construction of valley fills.

To prevent the approval of such variances—and thereby effectively end all coal mining in West Virginia—Petitioners sued the State Secretary in federal court, seeking a two-fold declaration and injunction. First, Petitioners wanted to enjoin the State Secretary from approving any surface mine permits without making a written finding as allegedly required by W.Va. Code § 22-3-18(b) that the application is complete and complies with West Virginia law. Second, Petitioners wanted the State Secretary permanently enjoined from issuing any variances to the West Virginia buffer zone rule for valley fills because of their contention that valley fills can never satisfy the criteria for such a variance.

Notwithstanding the State Secretary's assertion of Eleventh Amendment immunity, the district court sided with Petitioners and enjoined the State Secretary from issuing any variances for valley fills. The United States Court of Appeals for the Fourth Circuit reversed, holding that the district court lacked jurisdiction to enjoin a state official to comply with state law. The jurisdiction of the district court to make such an order is in dispute here.

SUMMARY OF THE ARGUMENT

There is no reason to grant the petition. The Fourth Circuit's decision was a straightforward application of the familiar, and undisputed, principle of law that this Court recognized in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), namely, that the Eleventh Amendment prohibits a federal court from entertaining a claim that seeks to enforce state law against a state official. In enforcing that principle here, the Fourth Circuit did not venture to decide an important question of federal law that this Court has not previously settled. Nor did the Fourth Circuit decide any federal question in a way that conflicts with this Court's prior decisions. Rather, the Fourth Circuit followed accepted law that this Court recognized nearly 20 years ago.

Straining to create some basis for review, Petitioners largely argue that the Fourth Circuit misapplied the *Pennhurst* rule to their particular complaint. Apart from the fact that such a contention is not a valid ground for a writ of certiorari, Petitioners are simply incorrect. The alleged duties that Petitioners sought to enforce against the State Secretary arose under West Virginia state law. The sole provision of SMCRA to which Petitioners cite, 30 U.S.C. § 1260, does not, and cannot, impose an independent, enforceable duty on the State Secretary under federal law in addition to any duties under state law. That is because SMCRA expressly provides at 30 U.S.C. § 1253(a) that States with approved surface mining programs like West Virginia have "exclusive jurisdiction" to regulate surface mining in its borders, just as the Fourth Circuit held.

Nor does the Fourth Circuit's decision conflict with a decision by another United States court of appeals or by a state court of last resort. No other court of appeals or highest state court has addressed the precise issue decided by the Fourth Circuit, and to the extent these other courts have addressed SMCRA's structure, they are in accord with the Fourth Circuit's view. All the allegedly contrary decisions relied on by Petitioners involved situations that did not raise Eleventh Amendment issues or that concerned fundamentally different federal statutes.

In short, there are no valid grounds for a writ of certiorari. The Court should deny the petition.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT SCRUPULOUSLY FOLLOWED *PENNHURST* IN HOLDING THAT THE ELEVENTH AMENDMENT BARS PETITIONERS' CLAIM.

The Fourth Circuit's decision that the Eleventh Amendment bars Petitioners' claim against the State Secretary did not decide a novel constitutional issue. That decision followed this Court's established Eleventh Amendment jurisprudence.

That jurisprudence is reflected in case after case in recent years in which the Court has reaffirmed the vital and enduring importance of the principles underlying the Eleventh Amendment. As those decisions make clear, the States' immunity against suit in federal court is a fundamental precept of our constitutional structure that preserves the dignity and respect of the States according to the Founders' vision. *See, e.g., Alden v. Maine*, 527 U.S. 706, 713 (1999) ("as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States. . . .' "), quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

In furtherance of those principles, this Court held nearly two decades ago in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that a State cannot be sued in federal court to comply with state law. The Court confirmed

with unmistakable clarity in that decision that such a lawsuit against a State is anathema to our federated system of government:

> [I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that [*Ex parte*] *Young* and *Edelman* [*v. Jordan*] are inapplicable in a suit against state officials on the basis of state law.

465 U.S. at 106.

The Fourth Circuit properly followed these principles. Petitioners' amended complaint made clear that Petitioners sought to enforce against the State of West Virginia a duty that Petitioners believed exists under the West Virginia buffer zone rule. In that regard, the lawsuit was brought against the State Secretary in his official capacity and therefore was a claim against the State of West Virginia. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (suit against state agency head in his official capacity is a suit against the State). The two counts still at issue in the amended complaint—the other counts having been settled—alleged that the State Secretary was acting "in violation of [W.Va. Reg.] 38 C.S.R. § 2-5.2(a) [the West Virginia buffer zone rule]." Amended Complaint ¶ 73 (JA 0319). The prayer for relief associated with those counts asked for a declaration that the State Secretary had not made findings allegedly required by that state regulation and for an injunction barring the State Secretary from approving variances for valley fills under that state regulation. Amended Complaint ¶ 91 A.2, L.3 (*JA 1817, 1821*).

The duty that Petitioners sought to enforce against the State Secretary, therefore, was a duty that allegedly existed under state law. Petitioners sought to have a federal court declare that the State Secretary was violating that state law, and Petitioners further sought an injunction from a federal court to compel the State Secretary in the performance of his state duties to comply with Petitioners' reading of that state law. The Fourth Circuit's decision that such a claim violates the Eleventh Amendment was a straightforward application of *Pennhurst* and was manifestly correct.

The propriety of that ruling is not diminished in any way because the West Virginia Mining Act may have been enacted in response to SMCRA and was crafted to include, at a minimum, the federal minimum standards itemized in SMCRA. The rule announced in *Pennhurst* does not concern itself with a State's motive for enacting its laws; the focus instead is on the State's constitutionally protected dignity interest against being haled into federal court and ordered to comply with state law. That interest is in full force here, as the Fourth Circuit recognized:

> The West Virginia statute and implementing regulations are solely the product of its own sovereignty, enacted pursuant to its democratic processes, and, as was the case in *Pennhurst*, a State's sovereign dignity reserves to its own institutions the task of keeping its officers in line with that law.

248 F.3d at 297 (App. 24a).

Simply put, the Fourth Circuit's decision did not decide a novel issue under the Eleventh Amendment. It applied settled law this Court has enforced for decades, and it applied that law properly.

II. THE FOURTH CIRCUIT'S REJECTION OF PETITIONERS' ARGUMENTS TO AVOID *PENNHURST* WAS CONSISTENT WITH THIS COURT'S ELEVENTH AMENDMENT JURISPRUDENCE AND THE STRUCTURE AND TEXT OF SMCRA.

Obviously cognizant of the fact that *Pennhurst* remains valid law, Petitioners advance three general arguments why they believe the Fourth Circuit allegedly misapplied *Pennhurst* here. This is an unsound basis for review. U.S. Sup. Ct. R. 10. Established law also defeats each of those arguments.

A. SMCRA's Citizen Suit Provision Is Irrelevant.

Petitioners' effort to justify their lawsuit under SMCRA's citizen suit provision, 30 U.S.C. § 1270(a)(2), is a red herring. In the first place, the plain text of that statutory provision does not purport to authorize any action in contravention of the Eleventh Amendment principles reflected in *Pennhurst*. To the contrary, that provision authorizes suits against state officials only "to the extent permitted by the eleventh amendment." 30 U.S.C. § 1270(a)(2). SMCRA's citizen suit provision, therefore, provides no support for the constitutional propriety of Petitioners' action.

Equally important, Congress could not use SMCRA's citizen suit provision to override the Eleventh Amendment and to authorize a lawsuit in federal court to compel a state official to comply with state law. As this Court made clear in *Seminole Tribe*, Congress cannot abrogate the States' Eleventh Amendment immunity through legislation, like SMCRA, that was enacted pursuant to the Commerce Clause. *See Hodel*, 452 U.S. at 268 (recognizing that SMCRA was enacted pursuant to the Commerce Clause). So regardless of the congressional

intent behind SMCRA's citizen suit provision and the particular language of § 1270(a)(2)—which was enacted before this Court's decision in *Seminole Tribe*—nothing in that provision can allow Petitioners, as a constitutional matter, to sue the State Secretary in federal court to comply with West Virginia state law. The refusal of the Fourth Circuit to construe SMCRA's citizen suit provision in a way that conflicts with *Seminole Tribe* does not present an issue worthy of certiorari.[3]

B. OSM's Regulations Do Not "Incorporate" Or "Codify" West Virginia Law Into Federal Law.

Petitioners' argument that two OSM regulations—30 C.F.R. §§ 900.11 and 900.12—"incorporate" or "codify" West Virginia's state surface mining program into federal law crashes against insurmountable constitutional obstacles. Not the least of these is the fact that Petitioners' theory would enable Congress to abrogate the restrictions on its authority recognized in

3. It also is notable that by its text, § 1270(a)(2) applies only to certain "non-discretionary" duties. Application of the West Virginia buffer zone rule, however, requires the exercise of considerable discretion. The criteria for a variance stated in the rule under which Petitioners sued are couched in terms that inhere with subjectivity—such as "adversely affect" and "materially damage"—and the State Secretary often must apply those criteria in the face of conflicting evidence. Consequently, Petitioners cannot maintain their claim against the State Secretary under § 1270(a)(2) regardless of any Eleventh Amendment considerations.

The Fourth Circuit elected not to address this issue in light of its ruling on the Eleventh Amendment. 248 F.3d at 299 (App. 27a). Yet this issue means this action does not present the proper context to consider Petitioners' Eleventh Amendment arguments, since Petitioners could not maintain their claim in federal court even if they were to prevail on those arguments.

Seminole Tribe. If Congress could empower an executive agency to transform state law into federal law via its regulations and thereby subject States to suit in federal court, the prohibitions on Congress' authority to override the Eleventh Amendment by legislation would be meaningless. Congress cannot indirectly alter the basic federal structure of the Constitution through agency action when Congress cannot do so through direct means. *Cf. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 683 (1999) (recognizing that Congress cannot use Article I powers to abrogate indirectly the holding of *Seminole Tribe* by obtaining constructive waivers of Eleventh Amendment immunity).

These concerns, of course, are in addition to the substantial Tenth Amendment problems that would be entailed in having agencies incorporate state law into federal law in the manner Petitioners posit. Such an incorporation would improperly allow federal agencies to transform state officials into unwilling federal deputies. *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government . . . may [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program").

Because of these grave constitutional concerns, OSM's regulations ought to be construed as *not* incorporating West Virginia law into federal law if at all possible. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Kent v. Dulles*, 357 U.S. 116, 129-130 (1958). And not only is that interpretation possible here, it is the only logical reading of OSM's regulations.

In the first place, no provision of SMCRA directs OSM, or any other agency, to incorporate any West Virginia law into federal law. If Congress had desired OSM to undertake such a remarkable feat, SMCRA presumably would contain a clear

directive to that effect. That SMCRA contains no such directive is a clear indication that Congress did not empower OSM to promulgate any such regulation. Any attempt by OSM to craft such a regulation, therefore, would be unreasonable and unlawful. *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 459 (2001) ("The EPA may not construe the statute in a way that completely nullifies textually applicable provisions. . . ."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (no deference due agency "position which is contrary to an intent of Congress expressed in unambiguous terms").

Furthermore, the portion of the Code of Federal Regulations reserved for West Virginia by OSM's regulations—30 C.F.R. Part 948—does not restate, or otherwise truly codify, West Virginia's statutes and regulations as part of federal law. Those regulations identify the dates the West Virginia program was approved, the action taken by the Secretary of Interior on amendments to the state program proposed by West Virginia, and the deadlines for West Virginia to adopt additional amendments recommended by the Secretary.

In other words, all that is "codified" in Part 948 are the Secretary's decisions to approve or disapprove the West Virginia program or parts of it. This follows from the language of 30 C.F.R. § 900.12(a) which provides that "upon approval of a State regulatory program the Secretary will publish a final rule to be codified under the applicable part number assigned to the State." Consistent with that regulation, the "final rule" that is codified in Part 948 for West Virginia is the Secretary's decision to approve the West Virginia program. That is a far cry from the notion that the West Virginia state program, *i.e.*, the West Virginia Mining Act and its associated regulations, are codified as federal law.

Indeed, Petitioners' argument on this score fails to explain OSM's regulations that consistently describe approved state programs as "State laws and regulations." *E.g.*, 30 C.F.R. §§ 730.5(a); 730.5(b); 731.14(a); 731.14(b); 731.14(c)(2); 732.15(a); 732.15(b); 732.15(c); 732.17(b)(3). Petitioners do not explain why, if OSM's regulations purport to treat approved state programs as federal law, OSM scrupulously maintains the distinction between federal and state law elsewhere in its regulations. Petitioners provide no explanation because there is none. OSM's regulations simply do not codify West Virginia law into federal law.[4]

C. The State Secretary Does Not Apply SMCRA When Administering The West Virginia Program.

No doubt because they realize that the West Virginia Mining Act is truly state law, Petitioners additionally try to circumvent *Pennhurst* by invoking a provision in SMCRA—30 U.S.C. § 1260(a)—that they assert imposes a direct duty on the State Secretary to comply with the West Virginia buffer zone rule. Petitioners misconceive the nature and structure of SMCRA.

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4. For these reasons, Petitioners' citation to two isolated references in the Federal Register where OSM reportedly stated that approved state programs become federal law are beside the point. OSM has no authority under the Constitution or SMCRA to transform state law into federal law, so any such pronouncement by OSM is legally inconsequential. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001) (holding that no deference was due agency interpretation that raised "significant constitutional questions" and was supported by "nothing approaching a clear statement from Congress"); *Edward J. Debartolo Corp.*, 485 U.S. at 575-76 (agency interpretations that raise serious constitutional questions are not entitled to deference).

As the Fourth Circuit explained, Petitioners' assertion that § 1260(a) imposes a direct duty on the State Secretary ignores the essential, and defining, characteristic of SMCRA. That characteristic is found in 30 U.S.C. § 1253(a), which gives States with approved programs the "exclusive jurisdiction" to regulate surface mining in their borders.

The term "exclusive" is unambiguous. It means, among other things, "limited to possession, control, or use by a single individual or group," "whole, undivided," and "single, sole (~ jurisdiction)." *Merriam-Webster's Tenth Collegiate Dictionary* at 404 (2001).[5] *See Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning"); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 725 (1994) (citing dictionary for "plain and ordinary meaning" of statutory term). And in the context of § 1253(a), "exclusive jurisdiction" means that a State with an approved program, like West Virginia, regulates pursuant to state law, not federal law.

This approach is consistent, of course, with the findings and statement of purpose that preface SMCRA, which express Congress' preference that state authority and state law remain intact. It also is consistent with numerous sections of SMCRA that repeatedly refer to approved state programs as "State law" and that establish different mechanisms for "State programs" and "federal programs." 30 U.S.C. §§ 1253(a)(1), (2) & (4); 1254. Even the provision on which Petitioners place much emphasis—30 U.S.C. § 1260—distinguishes "this chapter", *i.e.*, SMCRA, from state regulatory programs.

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5. Merriam-Webster uses the tilde or swung dash (~) to denote "a typical use of the word in context." *Merriam-Webster's Tenth Collegiate Dictionary* at 18a.

Against this context, it is apparent that § 1260(a) merely sets forth some of the standards that a state program must contain in order to obtain approval. In other words, a valid state program must contain provisions that permit the state authority to approve surface mining applications only if the authority finds in writing that the application complies with all applicable mining laws. That does not mean, however, that the state regulators are directly applying § 1260(a) when they approve permit applications. Rather, they are applying their state law counterpart.

There is no dispute that the West Virginia Mining Act contains a provision that satisfies the standards reflected in § 1260(a). This is W.Va. Code § 22-3-18(b), which provides, in part, that "[n]o permit or significant revision of a permit may be approved unless the applicant affirmatively demonstrates and the director finds in writing . . . that . . . (1) The permit application is accurate and complete and that all the requirements of this article and rules thereunder have been complied with . . . ." That is the law, then, that the State Secretary administers and is required to follow, and not § 1260(a).

Petitioners' contrary view of SMCRA would require the State Secretary to apply both § 1260 and the West Virginia Mining Act in considering permit applications. That view imposes *parallel* federal regulatory authority on the state permit program. But "exclusive" is not a synonym of "parallel." If a State's surface mining regulatory officials remain directly subject to federal rules and regulations—and indeed, can be sued under federal rules and regulations—it is hard to see in what way the State's regulatory jurisdiction is exclusive, as § 1253(a) mandates.

Indeed, it is rather telling that Petitioners provide no explanation of what the term "exclusive jurisdiction"

in § 1253(a) means if it does not have the meaning ascribed by the Fourth Circuit. Rather, Petitioners act as though that term does not exist. Needless to say, that is an invalid method of statutory construction. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("'[i]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'").

Petitioners' view also would require the Court to ignore the basic structure of SMCRA, as the Fourth Circuit observed:

> To construe SMCRA in the manner urged by [Petitioners], however, would circumvent the carefully designed balance that Congress established between the federal government and the States because the effect of a citizen suit to enjoin officials in a primacy State to comport with the *federal* provisions establishing the core standards for surface coal mining would end the exclusive State regulation and undermine the federalism established by the Act. Thus, rather than advancing the federal interest in preserving this statutory design, [Petitioners'] interpretation would frustrate it.

248 F.3d at 295 (App. 20a).

Petitioners try to gloss over these deficiencies by arguing that the Fourth Circuit somehow misinterpreted *Ex Parte Young*, 209 U.S. 123 (1908), in holding that Petitioners had no claim under § 1260(a). Not so. The Fourth Circuit fully recognized the *Ex Parte Young* exception to the Eleventh Amendment and did not limit, amend or modify that exception in any way. *See* 248 F.3d at 296-98 (App. 21a-26a). Rather, the Fourth Circuit held that, as a matter of statutory construction, § 1260(a) did not apply to the State Secretary and that Petitioners thus

lacked any basis for proceeding against the State Secretary under *Ex Parte Young*. This sound decision raises no substantial issue meriting review.

III. THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER DECISIONS.

Conspicuously absent from the petition is any citation holding that a state official can be sued in federal court to enforce that official's compliance with an approved state surface coal mining program. Petitioners provide no such citation because there is none. There is an appeal now pending before the United States Court of Appeals for the Third Circuit which raises this issue, but that appeal has not yet been argued, much less decided by the Third Circuit. *See Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Seif*, Appeal No. 01-1683.

As a result, there is no conflict among the circuits, or with any other court for that matter, on the issue decided by the Fourth Circuit. The cases cited by Petitioners are readily distinguishable and do not create a true conflict that justifies a writ of certiorari.

A. The Fourth Circuit's Decision Does Not Conflict With Any Decision Of This Court.

This Court has decided issues under SMCRA on only two occasions—*Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981); and *Hodel v. Indiana*, 452 U.S. 314 (1981). Petitioners do not contend that the Fourth Circuit's decision contradicts either of those decisions. Nor could they. Although those decisions did not address the ability to sue a state official in federal court, they did address SMCRA's basic distribution of regulatory authority. In describing that statutory structure, the Court at least implicitly acknowledged that approved state programs are state law and that states with such

programs have exclusive regulatory jurisdiction over surface mining within their borders. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 288 (discussing preservation of state authority under SMCRA for states with approved state regulatory programs).

Lacking any decision under SMCRA, Petitioners improperly assert a conflict with *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Their argument is misplaced. That case was brought against a *federal* permitting agency and did not concern the Eleventh Amendment or SMCRA at all. Rather, the case concerned whether the EPA, in deciding whether to issue a permit, had obeyed its own regulation requiring "compliance with the applicable water quality requirements of all affected States." Nothing in *Arkansas* speaks to any of the Eleventh Amendment or SMCRA issues that the petition raises.

B. The Fourth Circuit's Decision Does Not Conflict With Decisions Under SMCRA By Other Courts of Appeals.

Just as Petitioners cite no decision from this Court under SMCRA that contradicts the Fourth Circuit's opinion, they cite no contradictory decision from another court of appeals. Again, that is because no other court of appeals has addressed whether a state official can be sued in federal court to comply with an approved state surfacing mining program.

Petitioners instead suggest that an intra-circuit conflict exists between the Fourth Circuit's decision in this case and its decision in *Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231 (4th Cir. 1997). It is unclear why Petitioners make this argument, since an intra-circuit conflict is not a proper basis for a writ of certiorari. *See Taylor v. United States*, 493 U.S. 906, 907 (1989) (Stephens, J.).

Moreover, Petitioners unsuccessfully raised this alleged conflict in their petition for rehearing *en banc*, and not a single judge voted to rehear the case. That the Fourth Circuit does not believe its decision in this case contradicts its prior decision in *Molinary* fairly indicates that Petitioners' assertion of such a conflict is unfounded.

The Fourth Circuit's view of Petitioners' argument is undoubtedly correct. *Molinary* did not concern any of the Eleventh Amendment or other issues raised by Petitioners. The defendant in that case was not a state official, but a private corporation that had violated its mining permit. Furthermore, the focus of the holding in that case was the meaning of a phrase in one of SMCRA's citizen suit provisions that is not found in the provision under which Petitioners purport to sue. *Molinary*, therefore, in no way contradicts the Fourth Circuit's decision in this case and does not justify review by this Court.

The same is true for the only other appellate decision that Petitioners cite under SMCRA, *In re Permanent Surface Mining*, 653 F.2d 514 (D.C. Cir. 1981). That decision too did not involve a state defendant or any Eleventh Amendment issue. Indeed, it is difficult to see why Petitioners believed this decision even indirectly supports them, since that case states that "it is with an approved state law and with state regulations . . . that surface mine operations must comply." *Id.* at 519. This statement is a recognition that in primacy States like West Virginia, it is state law, and not federal law, that provides the operative rules of decision applicable to surface mining operations.

This is consistent with numerous other decisions by courts of appeals recognizing that SMCRA permits States to enact "their own" regulatory programs and that SMCRA does not directly operate in States with approved programs. *E.g., Coteau*

Properties, Co. v. Dep't of Interior, 53 F.3d 1466, 1472-73 (8th Cir. 1995) ("primacy status gives the state 'exclusive jurisdiction over the regulation of surface coal mining and reclamation operations,' § 1253(a), and state, not federal, regulations govern once a state program is approved by OSM"); *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 234 (3d Cir. 1995) (discussing that state programs "contain *state laws*"); *Nat'l Wildlife Fed. v. Lujan*, 928 F.2d 453, 464 n.1 (D.C. Cir. 1991) (recognizing that provisions of SMCRA do not "technically apply" in states with approved programs); *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, 498 (3d Cir. 1987) ("SMCRA itself is not violated by an operator's violation of a permit condition").

Petitioners ignore all these cases, yet these cases firmly establish that the Fourth Circuit's decision does not interpret SMCRA in some way at odds with other federal courts of appeals.

C. The Fourth Circuit's Decision Does Not Conflict With Appellate Decisions Under Other Environmental Statutes.

The significance that Petitioners ascribe to the decisions interpreting other federal environmental statutes must be taken with a considerable grain of salt, because Petitioners did not cite these cases in their brief before the Fourth Circuit. Petitioners' belated interest notwithstanding, those decisions do not establish any conflict with the Fourth Circuit's decision.

In the first place, the Eleventh Amendment was not an issue in any of those cases, with one exception. The one exception is *Natural Resources Defense Council v. California Dep't. of Transportation*, 96 F.3d 420 (9th Cir. 1996). That case, however, does not on its face speak about suing a state official to enforce state law. Rather, that case framed the issue under review as

whether the citizen suit provision of the Clean Water Act permitted an *Ex parte Young* action against a state official "for violations of the Clean Water Act." 96 F.3d at 421. Nothing about *Natural Resources Defense Council* is at odds with the decision below.

An equally fundamental problem with the cases under the other environmental statutes that Petitioners cite is that none of the statutes at issue in those cases includes provisions comparable to § 1253(a) in SMCRA. None of those statutes, in other words, provides that States with approved programs have exclusive regulatory jurisdiction, as SMCRA does. The possibility that an *Ex parte Young* action can be brought against a state official *without* exclusive regulatory jurisdiction simply does not address whether such an action can be brought against one *with* such exclusive jurisdiction.

D. The Fourth Circuit's Decision Does Not Conflict With Appellate Decisions Under IDEA.

As with the citations regarding other environmental statutes, Petitioners' reliance on case law under the Individuals with Disabilities Education Act (IDEA) is a belated infatuation. Petitioners did not cite any of these cases in their brief below, yet now Petitioners would have the Court believe that these opinions are central to the issues in this case. They are not.

Unlike SMCRA, IDEA was passed pursuant to Congress's powers under the Fourteenth Amendment. *David D. v. Dartmouth School Committee*, 775 F.2d 411, 420 n.7 (1st Cir. 1985), citing *Smith v. Robinson*, 468 U.S. 992 (1984). And again unlike SMCRA, IDEA requires that States waive immunity in order to participate, and as of 1997, even contained an express abrogation of state immunity. 20 U.S.C. §§ 1403(a), 1415.

For these reasons, IDEA and cases decided thereunder are completely irrelevant to the issues here. This is all the more true because both IDEA cases cited by Petitioners predate *Seminole Tribe* and this Court's subsequent Eleventh Amendment jurisprudence.

E. The Fourth Circuit's Decision Does Not Conflict With Any Decisions Of The West Virginia Supreme Court.

Petitioners also assert erroneously that the Fourth Circuit and the West Virginia Supreme Court have reached "opposite conclusions" concerning the interrelationship between SMCRA and the West Virginia Mining Act. The chief case on which Petitioners rely for this proposition is *Canestraro v. Faerber*, 374 S.E.2d 319 (W.Va. 1988), in which the West Virginia Supreme Court held that a provision of the West Virginia Mining Act *contrary* to SMCRA could not be enforced even though approved by OSM. But the reason for the West Virginia Supreme Court's ruling in that case was 30 U.S.C. § 1255(a). That section expressly provides that state laws inconsistent with a provision of SMCRA are superseded by the pertinent federal provision. *See* 374 S.E.2d at 321.

The West Virginia buffer zone rule is not, and has never been alleged to be, inconsistent with SMCRA. The West Virginia buffer zone rule thus is *not* superseded, and § 1255(a) has no application to this case. *Canestraro* and the other West Virginia Supreme Court decisions relied on by Petitioners simply do not create a conflict with the Fourth Circuit's decision and provide no basis for a writ of certiorari.

IV. THE FOURTH CIRCUIT'S DECISION DOES NOT UNDERMINE ENFORCEMENT OF FEDERALLY-APPROVED STATE SURFACE MINING PROGRAMS.

Petitioners' speculation that some court in the future might misconstrue some of the language in the Fourth Circuit's decision and somehow undermine SMCRA's enforcement provides no basis for granting of a writ. This Court sits to review judgments, and not for the purpose of editing opinions. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions"); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (noting that predicted impact of broad statements of California Supreme Court's opinion was not before Supreme Court because "[t]his Court, however, reviews judgments, not statements in opinions").

Petitioners' alleged concerns are unfounded in any event. The Fourth Circuit's decision makes clear that its holding does not limit in any way the enforcement authority of the federal government. The Fourth Circuit noted, for instance, that the Eleventh Amendment does not apply to actions filed by the United States. 248 F.3d at 291 (App. 14a). The Fourth Circuit also explicated in great detail the federal government's oversight authority under SMCRA and the various administrative powers that SMCRA vests in OSM if OSM concludes that a State is not complying with its approved program. *E.g.*, 248 F.3d at 294 (App. 18a-19a). Nothing in the Fourth Circuit's decision can fairly be read to curtail any of this statutory authority.

Similarly, Petitioners' lamentations about the effect of the Fourth Circuit's decisions on citizen suits to enforce SMCRA are grossly exaggerated. The Fourth Circuit's decision does not

limit in any way the ability to file citizen suits in federal court against those who are not officers of the States. Furthermore, as the Fourth Circuit observed, its decision leaves Petitioners free to sue the State Secretary in state court for enforcement of West Virginia's plan. The West Virginia Mining Act contains a citizen suit provision, at W.Va. Code § 22-3-25, that permits its officials to be sued in state court to enforce any of their non-discretionary duties under that statute.

It goes without saying that state courts are presumed to follow the law and to be fully capable and even-handed in their decision-making. That Petitioners, therefore, must pursue in state court any claim they may have against the State Secretary hardly justifies a writ of certiorari. Petitioners are required to do nothing different than what the Founding Fathers built into the Constitution over 200 years ago. *New York v. United States*, 505 U.S. 144, 178-79 (1992) (Constitution, through Supremacy Clause, expressly contemplated state court enforcement of federal law); *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975) (presuming that state court will abide by "the fundamental law of the land").

CONCLUSION

There is no basis for a writ of certiorari. The Fourth Circuit's decision did not conflict with any decision of this Court but followed the law established in *Pennhurst*. No court of appeals or state court of last resort has issued any opinion that contradicts the Fourth Circuit's decision. The Court should deny the petition.

Respectfully submitted,

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